United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No. 75-1224

B
P/S

To Be Argued By
MAXWELL HEIMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

VS.

MICHAEL CHIARIZIO

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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PLAINTIFF-APPELLEE

VS.

MICHAEL CHIARIZIO,

DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

All proceedings in this case were held before The Honorable M. Joseph Blumenfeld, United States District Judge. The decision on the Motion to Dismiss The Indictment and Motion to Suppress is reported in 388 F. Supp. 858 (1975).

ISSUES INVOLVED

The questions for decision here are:

1. Whether or not the Court erred in denying the appellant's Motion to Suppress.

2. Whether or not the Court erred in denying the appellant's Motion to Dismiss the Indictment.

3. Whether or not the Court erred in denying the appellant's Motion to excuse the entire jury panel on the ground of the detrimental effect on defendant Michael Chiarizio caused by the remark of a prospective juror during voir dire before the entire panel, in violation of his rights under the Sixth Amendment to the Constitution of the United States.

4. Whether or not the Court erred in admitting into evidence Government's Exhibit 47, the voice exemplar of the appellant Michael Chiarizio, and Governments' Exhibits 54, 55, 57, 58, 60, 61 and 63 (f) and (g), the original tapes, pen register results and summary tapes, for the reason that the required chain of custody and foundation had not been established.

5. Whether or not the Court erred in permitting the jury to examine Exhibits marked for identification only; which said exhibits purported to be transcripts of conversations made from duplicate tapes.

6. Whether or not the Court erred in allowing Agent Santacroce to read to the jury from the alleged transcripts, those transcripts being documents not in evidence.

7. Whether or not the Court erred in allowing the jury

to receive and examine certain cards, which were attached to the transcripts, but which were not marked for identification, or received in evidence as full exhibits.

8. Whether or not the Court erred in admitting the opinion testimony of Agent Santacroce concerning the identity of voices heard on the tapes and further erred in admitting his opinion that said conversations were of a gambling nature.

STATEMENT OF PROCEEDINGS

The defendant, Michael Chiarizio, (hereinafter called Chiarizio), along with other defendants, was charged with violation of Title 18, U. S. C. Section 1955 and Section 371 which offenses were set forth in an indictment bearing Criminal Docket No. H74-51 which indictment was in two counts as follows:

"COUNT ONE

From on or about March 1, 1973 up to and continuously through May 15, 1973 at Hartford, Southington, New Britain, Newington, East Berlin, Wethersfield, Bloomfield, Rocky Hill, Connecticut, within the District of Connecticut, and at various other places within the District of Connecticut, MICHAEL CHIARIZIO, a/k/a "Mickey", JAY SCHAEFER, a/k/a "Jack", ANGELO DESENA, a/k/a "Desi", EMIL SAPERE, PETER SHERIDAN, PHILIP FRASCARELLI, a/k/a "Baskets", MORTON WHITE, DAVID LEE JOHNSON, a/k/a "Whitey", CECIL JOHNSON, BENJAMIN BIRENBAUM, CARL VERNALE, and MICHAEL CAVARRA, the defendants herein, and persons whose names are unknown

to the grand jury, to include "Mary", "Jack", "Pal" and others, did knowingly and wilfully own, conduct, finance, manage, supervise and direct all or part of an illegal gambling business in concert with each other, to wit, a bookmaking business, such business being in substantially continuous operation for a period in excess of thirty (30) days, and having a gross revenue of $2,000 or more, on one or more single days, involving five (5) or more persons in its conduct, financing, management, supervision and direction, and being in violation of the laws of the State of Connecticut, to wit, Connecticut General Statutes, Title 53, Section 295, as amended, Connecticut Public Act 865, Section 23 (1971 Sess.)

All in violation of Title 18, United States Code, Sections 1955 and 2.

COUNT TWO

1. From on or about March 1, 1973 up to and continuously through May 15, 1973 at Hartford, Southington, New Britain, Newington, East Berlin, Wethersfield, Bloomfield, Rocky Hill, Connecticut and at various other places in the District of Connecticut, MICHAEL CHIARIZIO, a/k/a "Mickey", JAY SCHAEFER, a/k/a "Jack", ANGELO DESENA, a/k/a "Desi", EMIL SAPERE, PETER SHERIDAN, PHILIP FRASCARELLI, a/k/a "Baskets", MORTON WHITE, DAVID LEE JOHNSON, a/k/a "Whitey", CECIL JOHNSON, BENJAMIN BIRENBAUM, CARL VERNALE, and MICHAEL CAVARRA, the defendants herein, did unlawfully, wilfully

and knowingly combine, conspire, confederate and agree together and with each other and with diverse other persons, such as "Mary" and "Jack", "Pal" and whose names are unknown to the grand jury, to commit an offense against the United States to wit, to violate Title 18, United States Code, Section 1955.

2. It was the object of the conspiracy that the defendants would conduct, finance, manage, supervise, direct and own, all or part of an illegal gambling business, which was in violation of the laws of the State of Connecticut, to wit, Connecticut General Statutes, Title 53, Section 295, as amended, Connecticut Public Act 865, Section 23 (1971 Sess.), which involved five (5) or more persons who conduct, finance, manage, supervise, direct or own all or part of such business and which had a gross revenue of $2,000 or more in a single day and which was in substantially continuous operation for a period of thirty (30) days.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the District of Connecticut:

1. On March 22, 1973 at approximately 7:02 p.m., MICHAEL CHIARIZIO, a defendant herein, spoke on the telephone with JAY SCHAEFER, a defendant herein.

2. On March 31, 1973 at approximately 12:05 p.m., MICHAEL CHIARIZIO, a defendant herein, spoke on the telephone with

PHILIP FRASCARELLI, a defendant herein.

3. On March 24, 1973 at approximately 1:33 p.m., MICHAEL CHIARIZIO, a defendant herein, spoke on the telephone with PETER SHERIDAN, a defendant herein.

4. On March 24, 1973 at approximately 11:30 a.m., MICHAEL CHIARIZIO, a defendant herein, spoke on the telephone with MORTON WHITE, a defendant herein.

5. On March 24, 1973 at approximately 12:27 p.m., MICHAEL CHIARIZIO a defendant herein, spoke on the telephone with CECIL JOHNSON, a defendant herein.

7. On May 11, 1973 at approximately 2:50 p.m. Angelo DeSena, a defendant herein, spoke on the telephone with Carl Vernale, a defendant herein.

8. On May 12, 1973 at approximately 11:57 a.m., Jay Schaefer, a defendant herein, spoke on the telephone with Angelo DeSena, a defendant herein.

9. On May 10, 1973 at approximately 7:56 p.m. Jay Schaefer, a defendant herein, spoke on the telephone with Benjamin Birenbaum, a defendant herein.

10. On May 11, 1973 at approximately 2:29 p.m., Jay Schaefer, a defendant herein, spoke on the telephone with David Lee Johnson, a defendant herein.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371.

A TRUE BILL"

The defendant filed a Motion to Dismiss the Indictment and Motion to Suppress certain evidence, which said preliminary motions were denied. United States v. Chiarizio, 388 F. Supp. 858.

A timely defense motion to dismiss the entire jury panel due to a prejudicial remark by a prospective juror was denied.

During the trial of the case the defendant renewed his motion to suppress, objecting to the admission of certain evidence, which said motion was denied by the Court during the trial.

Upon completion of the Government's case in chief, the defendant seasonably moved for a judgment of acquittal on both counts of the indictment and moved to strike certain evidence. These motions were denied by the Court.

Thereupon the defendant rested without offering any evidence.

The Court instructed the jury as to the law of the case, with the defendant taking timely exceptions to the Charge.

The jury returned a verdict of guilty on both counts of the indictment.

On June 16, 1975, the Court sentenced the defendant to a term of two years in the custody of the Attorney General on each count to run concurrently, and imposed a fine of $5,000 on the First Count of said indictment. Execution of the term of imprisonment was ordered suspended after the

defendant served six (6) months, whereupon the defendant was placed on probation for a period of three (3) years. A condition of probation is that the fine be paid pursuant to a payment schedule worked out by the Probation Department and the defendant. The Court further ordered that the period of probation is to terminate upon the complete payment of the fine.

Thereupon, the defendant gave notice of appeal and now comes before this Court.

STATEMENT OF FACTS

From on or about March 22, 1973, to April 2, 1973, the F.B.I., via wiretaps, allegedly intercepted and taped telephone conversations held over Hartford telephone number 247-5976. (Tr. pp. 359-360). From on or about May 9, 1973 through May 14, 1973, the F.B.I., via wiretaps, allegedly intercepted and taped telephone conversations held over telephone numbers 223-3117 and 828-5713, which numbers were purportedly listed to Angelo De Sena and Charles Schaefer, respectively. (Tr. pp. 373-375).

The Hartford telephone, Number 247-5976, was allegedly situated in the apartment of one Mrs. Marie Rubera, 1889 Broad Street, (Tr. p. 33; p. 359). Michael Chiarizio's address was allegedly 1891 Broad Street, Hartford. (Tr. p. 5). Over defendant's objection, the Government attempted to prove by hearsay evidence that Mrs. Marie Rubera was

the grandmother of Michael Chiarizio. (Tr. p. 6).

At the trial, the Government played to the jury summary tapes of the alleged intercepted conversations. These summary tapes were purportedly made from duplicates of the original tapes, which alleged originals are still court-sealed. (Tr. pp. 532-545). Despite defendant's objections to their proper chain of custody the summary and "original" tapes were admitted into evidence. (Tr. pp. 406, 407, 408, 419, 531, 532; 545, 546). Portions of the tapes heard by the jury were inaudible.

While the summary tapes were played, the Judge, over defendant's objection, allowed each juror to read documents which were prepared by the F.B.I. and purported to be transcripts of these tapes. These documents were marked for identification only and were never introduced into evidence as full exhibits. Moreover, white cards were attached to these documents, said white cards containing among other information, the names of the parties to the conversation as claimed by the F.B.I. (App. pp. 92A-96A).

Prior to trial, despite defense counsel's request, the Judge refused to listen to the tapes or compare the alleged transcripts. (App. pp. 24A-30A). The accuracy of these "transcripts" was highly disputed by defense counsel. (App. pp. 62A-65A).

Over defendant's objection, F.B.I. Case Agent Dewey Y. Santacroce read to the jury these alleged transcripts,

which were not in evidence. (Tr. pp. 453). He also was allowed over objection, to give his non-expert opinion as to the alleged gambling nature of these conversations. (Tr. pp. 421, 422, 427, 428).

The Government never established to the jury that Agent Santacroce was personally familiar with Michael Chiarizio's voice. Instead, Agent Santacroce, over objection, admittedly not an expert on speech patterns, gave his opinion that Michael Chiarizio's voice was on the wiretaps, as based upon his comparison of a duplicate copy of Michael Chiarizio's alleged voice exemplar and the alleged wiretap tapes. (App. pp. 49A-52A; 86A-91A). It appears from the record that Michael Chiarizio's voice exemplar was never played to the jury, thereby preventing them from making an independent judgment as to voice identity. All the purported original voice exemplars had been admitted into evidence despite objections as to proper chain of custody. (Tr. p. 342).

ARGUMENT

ALL CLAIMS OF ERROR HEREINAFTER SET FORTH ARE CLAIMED FOR BOTH COUNTS OF THE INDICTMENT.

The defendant respectfully submits that all claims of error hereinafter briefed, pertain with equal force to both counts of the indictment since the defendant was found guilty on both counts by evidence offered by the Government which it claimed supported the guilt of the accused as to both counts of the indictment.

I

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS.

The defendant filed and argued a Motion to Suppress the wiretap evidence, based in part upon claims relating to the failure by the Government and the Court to comply with Chapter 119-Wire Interception and Interception of Oral Communications 18 U.S.C. Sections 2510-2520. (App. pp. 1A-21A)

First, the defendant submits that the Government excessively used wiretapping procedures. From February 3, 1973, through February 28, 1973, F.B.I. agents conducted court-approved wire interceptions over telephone 203-754-3506 and claimed to have monitored the conversations of Joseph Telesca, Angelo De Sena, Carmello Coco, Michael Chiarizio, Aaron Hyatt and Jay Schaefer. Upon termination of that court-approved procedure, the government, on March 22, 1973, made application for, and obtained a court order to, conduct additional wire interceptions of the same named individuals, "and others as yet unknown", to intercept wire conversations over Hartford telephone number 203-247-5976. As revealed in the agent's affidavit and the transcript of chambers proceedings, this wiretapping was sought "to fully determine the extent of the gambling operation that wasn't covered during the wire communications intercepted over telephone number 203-754-3506 being utilized by Joseph Telesca." Affidavit of FBI Agent Dewey L. Santacroce, dated 3-22-73, p. 11, paragraph 23. See also Chambers Transcript, 3-22-73, pp. 3-4.

The Congress in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1967 had a two-fold purpose: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." Senate Report, No. 1097, 90th Congress, 2d Session (1968), p. 66. Thus, one of the purposes intended by the Congress was to minimize the use of wiretapping. The defendant submits that prior to obtaining the March, 1973, Court Order, the Government, under Title III, had an affirmative duty to spell out to the Court precisely what it had gleaned from the February, 1973, interception procedures, and to state fully and completely why the additional tapping it sought in March of 1973, was necessary. 18 U.S.C. Section 2518(1)(e); Senate Report, supra, pp. 101-102. The government made no showing to the Court, nor did the Court find that the March, 1973, wiretapping was essential to the investigation of the alleged criminal acts in question. Indictments including an indictment of the appellant, herein, had resulted from the February, 1973, wiretapping at Waterbury, Connecticut. Accordingly, it is submitted that the evidence obtained from that procedure was sufficient and since its authorized objective had been obtained, the March, 1973, wiretapping, which is

of a "piggyback" character, was excessive and violative of the spirit, letter and intent of Title III, 18 U.S.C. Section 2518(1) and 2518(5).

A second contention of the defendant is that the defendant, Emil Sapere, was not named in the applying papers or Court order for the March, 1973, interception procedure. 18 U.S.C. Section 2518(1)(b)(iv) requires that the applicant for the interception order state "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) requires that the court order state the identity of that person. Here, the March proceedings do not, in either the application or court order contain the name of the defendant, Emil Sapere. The two statutory sections were recently construed in United States v. Kahn, 415 U.S. 143, 155, 94 S. Ct. 977, 39 L. Ed. 2d 225, 237 (1974):

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons 'as yet unknown' covered by Judge Campbell's order."

In this case, unlike United States v. Kahn, supra, it is

undisputed, it is submitted, that the government did know of a gambling relationship of a "lay-off" nature between Emil Sapere and Michael Chiarizio, as shown by Government filed documents and the evidentiary hearings of September 10, 1974, and October 16, 1974.

During the September 1974 evidentiary hearing in this matter, Agent Ludwig testified to his procedure of interviewing or contacting "Source 1" as recited in an October 1971 Affidavit. Mr. Ludwig testified that the contacts subsequent to the initial contact with "Source 1" concerning the "lay-off" relationship between Mr. Sapere and Mr. Chiarizio was in the nature of "updating" the information that "Source 1" had originally delivered to the FBI in October 1971. (T-51-54). 1/

Mr. Ludwig noted that during the November, 1971, interception of Emil Sapere's telephones, the pen register device showed four outgoing telephone calls to Hartford number 247-5976 (one being misdialed) and three calls to Hartford number 278-6139. Two of the seven calls were intercepted and on each of these two calls, Mr. Emil Sapere was a party to the conversation. (T-68). The agent

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1/ The transcript of the September 1974 hearing will be hereinafter referred to as "T-"; the Transcript of the October 16, 1974 hearing will be referred to herein as "TR - ".

testified that no identification of the other party to the conversation was made. However, the agent from the interception was aware that Mr. Sapere was calling either a "Matt" or "Mike" at the pen register indicated number; and that both of the calls might be gambling related. (T-68-78, T-91-92). Subsequently, Agent Ludwig testified that he obtained subscription information on this telephone number in question from the Southern New England Telephone Company and determined that it was subscribed by Edwina Dawidowicz, whom the Agent knew prior to November, 1971 to be the common law wife of the defendant herein, Michael Chiarizio. (T - 93-94). Mr. Ludwig also indicated that he made inquiry of SNETCo only to investigate more fully gambling related calls. (T - 98).

Accordingly, the defendant submits that in addition to the informant information received by the FBI concerning the "lay-off" relationship between Sapere and Chiarizio, the FBI had in its possession through its wire interception procedures sufficient factual information to cause it to know that there was an ongoing relationship of a "lay-off" nature involving Mr. Sapere and Mr. Chiarizio and the use of Hartford telephone numbers 247-5976 and 278-6139. 2/

2/ See Testimony of SNETCo. representative John O'Connor T - 11-44 and hearing Exhibits 1-9 for the nature and extent of information requested by the FBI related to these Hartford telephone numbers.

Mr. Ludwig also testified during the September 1974 hearing that he telephoned Mr. Chiarizio prior to Mr. Sapere's being indicted in May of 1972 and had a discussion with Mr. Chiarizio near the Hearthstone Restaurant in Hartford. (T - 105) The agent stated that the purpose of the meeting was probably based on the known gambling relationship between Mr. Chiarizio and Mr. Sapere. (T - 107 & 125) (See also: the testimony of Agent Santacroce concerning the FBI's interest in Mr. Chiarizio for the prosecution of Mr. Sapere for Section 1955 violations.) (T - 148-153)

During the September 1974 evidentiary hearing, the FBI Case Agent in the case at bar, Dewey Santacroce, testified that he had worked with Agent Ludwig on the first Sapere prosecution; had discussed that case with Ludwig and was aware of the relationship between Sapere and Chiarizio but that relationship was "forgotten" when the FBI made application for the 1973 tap on Chiarizio. (T - 166-167, 169) In other words, the known relationship between Sapere and Chiarizio was forgotten and, it is submitted, because of that forgetfulness Mr. Sapere was not named in the March 1973 application.

It is respectfully submitted that an explanation that certain information was in the possession of an individual, but that it was "forgotten" at a crucial point in time is

not an acceptable explanation in fact or in law. The spectre of a convenient memory and its effect on an orderly judicial process is frightening to contemplate. If the Court approves this mental lapse as an excuse from full compliance with the requirement that the Government make known to the Court all persons whom it has probable cause to suspect of complicity, it will, by judicial interpretation, amend the clear mandate of 18 U.S.C. Section 2518(1)(b)(iv). Cf United States v. Kahn, supra.

It is respectfully submitted that the law clearly requires a strict adherence to the mandates of the statute, which were clearly not followed in the case at bar. See, United States v. Giordano, 416 U. S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d. 341 (1974)

On October 16, 1974, now retired FBI Agent Edward Stiles testified that he worked in conjunction with Agent Ludwig and Agent Santacroce on the Sapere and Chiarizio investigations, which ultimately led to indictments in this case. While Stiles had no case specifically assigned to him concerning either Sapere or Chiarizio, the former FBI agent described his role in part as involving "contacting sources that would be in a position to know what was going on." (TR - 15-16) Pertinent to the "lay-off" relationship between Sapere and Chiarizio, the agent confirmed that the so-called "Source 1" did give the FBI information concerning that relationship and that Stiles continued to investigate

the relationship after being first informed of it (TR - 21); however, although the Bureau had a file on all that "Source 1" had supplied to the FBI, Mr. Stiles had no recollection at the time of the October 1974 evidentiary hearing as to what the informant had told the Bureau concerning a "lay-off" relationship after 1971, when there were numerous contacts with the informant concerning that relationship. (TR - 23, 32-33) -- There was also testimony and a stipulation of fact that the Bureau file on "Source 1" was available to Ludwig and Santacroce working on the Sapere and Chiarizio matters. (TR - 36, 58)

The defendant submits that the government, based on its investigation of defendants Sapere and Chiarizio knew and had reason to suspect, as set out in United States v. Kahn, that Mr. Sapere would be intercepted for gambling related activity on telephone number 247-5976 when the government applied for its interception order on that phone in March, 1973. Based on its possession of this knowledge, it is submitted, that the government had, under 18 U.S.C. Section 2518(1)(b)(iv), an affirmative duty in its application to name specifically Mr. Sapere, an indicted defendant, for authority to listen to his phone conversations and the court order ought to have passed upon that requested authority. 18 U.S.C. Section 2518(4)(a).

The defendant's third claim in the Motion to Suppress

was that not only did the Government fail to furnish the authorizing Court a full and complete statement of prior intrusion proceedings as required by 18 U. S. C., Section 2518(1)(e) so that the Court could determine the validity of additional wiretapping, but also that the Government, in its applications, failed completely to inform the authorizing Court of wire interception proceedings pertinent to the prosecutions, Docket No. H-263 in this District. The Government failed to inform the Court of court-approved wiretapping under orders dated November 11, 1971, of the following telephones affecting the co-defendant, Michael Chiarizio:

203-529-7138, subscribed by Emil Sapere,

203-563-4524, subscribed by Emil Sapere,

203-529-8825, subscribed by Emil Sapere.

These three mentioned telephones, according to government-filed documents, were all located at the residence of the co-defendant, Emil Sapere, in Wethersfield, Connecticut. Upon information and belief, many of the conversations of Emil Sapere revealed by the government in response to disclosure in Docket No. H-263, also involved Michael Chiarizio.

Since the government failed to comply with the mandates of Title III in these regards, the wiretap proceedings were defective. United States v. Bellosi, _____, F. 2d_____, (D. C. Cir. 1974), 15 Cr. L. 2383

(8-7-74). Senate Report, supra, pp. 101-102.

The Supreme Court of the United States in a recent case, United States v. Giordano, supra, has interpreted 18 U. S. C. Section 2518(10)(a)(i), which provides for suppression of evidence when the communication is "unlawfully intercepted." The Court stated:

> "The words 'unlawfully interceped' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of the extraordinary investigative device." Id at 40 L. Ed. 2d 360.

The defendant respectfully submits that the failure of the Government to comply with the mandates of Title III as hereinbefore set out constituted a failure to satisfy "those statutory requirements that directly and substantially implement the congressional intention" of limiting intercept procedures. This failure thus vitiates the whole wiretap proceeding in this case. Accordingly, the Court erred in denying the Motion to Suppress. United States v. Giordana, supra.

II

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT.

The appellant filed and argued a Motion to Dismiss the Indictment based in part upon the doctrine of abatement

and pardon. (App. pp. 1A-21A).

Title 18 United States Code Section 1955, with which he stands charged, has as an essential element thereof, that there must be proven a gambling operation which is in violation of the law of the state or political subdivision in which it is conducted.

Connecticut General Statutes, Section 53-295, Revision 1958 as amended by Section 23 of Public Act 71-865, is the particular statute which the government claims the appellant violated, in the April 9, 1974 indictment.

That statute was repealed by Section 9 of Public Act 73-455 effective October 1, 1973, and, it is submitted that the prosecution of the indictment against the appellant Michael Chiarizio violated the doctrine of abatement and pardon.

Connecticut General Statutes, Section 53-295 had been previously repealed by 1972 Public Act 187, Section 16, effective April 27, 1972.

The doctrine of abatement and pardon provides that where an offense is committed against a statute, and afterwards, and before conviction and final sentence, the statute is repealed, all proceedings under it, which were not past and closed, are thereby arrested as if the statute never existed.

Connecticut, as most other jurisdictions, Hamm v. Rock Hill, 379 U. S. 306, 312, (1964), has long recognized

the doctrine of abatement, which holds that the repeal of a criminal statute terminates all criminal prosecution for the conduct alleged, unless there has been a final determination of the case. State v. Daley, 29 Conn. 272, 275, (1860) State v. Grady, 34 Conn. 118, 128 (1867).

As the Connecticut Supreme Court said over 100 years ago:

> "The effect of that repeal is to leave no sanction or punishment for that crime which is applicable to such previous offenders. The effect of such repeal was, for the most obvious reason, that the law, as to any proceedings under it which were not past and closed and therefore furnishes no authority, after its repeal, for the commencement of any proceedings, or for the further prosecution of any which had been before commenced. Hence it has often been decided that a provision of either the statutory or common law, which authorized the prosecution and conviction for a specific offense, is repealed before final judgment, the court can proceed no further with the case, and that sentence cannot be pronounced, even although a verdict has been rendered against the prisoner, and he must therefore be discharged. 1 Bishop Crim Law, Section 103; and cases there referred to. Dwarris on Statutes 535. It is very clear, therefore, that as the statute prescribing the punishment for the specific offense committed by the defendant was repealed and unqualifiedly after its perpetration and before his trial, no judgment can be rendered against him under that law". State v. Daley, supra 29 Conn. at 275. (Emphasis Added).

The operation of the abatement doctrine can only be avoided if the legislature provides a savings clause in

the repealed statute or if the legislature enacts separate legislation which would serve as a savings clause.

The State of Connecticut presently has two savings clauses in the General Statutes.

> "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed." Connecticut General Statutes, Section 1-1.

> "The repeal of any statute defining or prescribing the punishment for any crime shall not effect any pending prosecution or any existing liability to prosecution and punishment therefore, unless expressly provided in the repealing statute that such repeal shall have that effect." Connecticut General Statutes, Section 54-194.

Savings clauses of this nature, which work against the doctrine of abatement, are, as the Supreme Court of the United States recently observed, in derogation of the common law and must be strictly construed. Bell v. Maryland, 378 U. S. 226, 234 (1963). Connecticut has long recognized that statutes in derogation of the common law must be strictly construed. Chapel-High Corporation v. Cavallaro, 141 Conn. 407, 410. Carter v. Carter, 147 Conn. 238, 242 (1960), 243. "In determining whether or not a statute abrogates or modifies a common-law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope." Willoughby v. New Haven, 123 Conn. 446, 454 (1937). Connecticut General

Statutes, Section 1-1 is of no avail to protect against abatement because it only applies to "punishment...incurred... or prosecution pending..." before the repeal takes place. In the case at bar no penalty had been incurred nor was this proceeding pending prior to the effective date of the repeal, since this action was not initiated until the indictment was filed on April 9, 1974, almost two years after the initial repeal of the statute in question. Phinney v. State, Tenn Ct. Cr. App.__, 6 Cr. L. 2142 (1969) supports the appellant's contention in that regard. In that case, the Court was called upon to interpret a savings statute almost identical to Connecticut General Statutes, Section 1-1 and held that the clause could not save the action since it applied only to prosecutions begun prior to the repeal of the Statute.

Connecticut's other savings statute, Connecticut General Statutes, Section 54-194, supra was enacted in 1871, ten years prior to the enactment of Connecticut General Statutes, Section 1-1. However, although it appears on its face to apply to existing liability to prosecution it is respectfully submitted that it is not controlling and does not apply in light of the general principal of law that "When there are two conflicting sections of a general compliation or code of statute laws, that the section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject." Tuohey v. Martiniak, 119 Conn. 500, 507. (1935).

It is respectfully submitted, that the later legislative enactment controls, and that Connecticut General Statutes, Section 54-194 is inapplicable to the case at bar.

In view of the principal of abatement and pardon, and the well recognized principals of statutory construction, and considering the fact that Courts must strictly construe penal statutes in favor of the accused, State v. Bello, 133 Conn. 600, 604 (1947), it is respectfully submitted that all liability for the acts alleged in the indictment have been abated and pardoned by legislative repeal of the statutes alleged as the stated basis for this prosecution.

The necessary element of 18 U. S. Code 1955, that the action be in violation of state law is therefore absent in this case, and the Court erred in denying the defendant's Motion to Dismiss the Indictment.

III

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION TO EXCUSE THE ENTIRE JURY PANEL ON THE GROUND OF THE DETRIMENTAL EFFECT ON DEFENDANT MICHAEL CHIARIZIO CAUSED BY THE REMARK OF A PROSPECTIVE JUROR DURING VOIR DIRE BEFORE THE ENTIRE PANEL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

During the voir dire examination, a prospective juror, in response to the Court's inquiry, stated that he had met Michael Chiarizio in the past and added, "I'm not a personal friend of his but I have met him. Not in the business he's in, though." (App. pp. 22A-24A). Although this juror was subsequently excused, it is respectfully submitted that his comment left on the remaining jurors'

minds an indelible mark which was not expunged by any subsequent inquiry by the Court as to the possible prejudice caused by his words. Indeed, the Court made no inquiry at all, nor did it give the defendant the benefit of any cautionary instruction to the remaining members of the panel.

The remark "not in the business he's in, though" strongly implied that the appellant, Michael Chiarizio, was involved in the gambling business. Such a comment, coming from a man who allegedly knew the defendant, especially, at this early stage of the proceedings, when, the entire stage of the trial was being set, carried undue weight in the remaining jurors' minds, thereby creating a pre-conceived notion of the defendant's guilt. C. F. State v. Strong, 196 N. E. 2d. 801 (Ct. App. Ohio, 1963).

The remark was especially harmful in view of the statutory language of 18 U. S. C. 1955

> "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business ..." 18 U. S. C. 1955 (Emphasis Supplied)

Proving a "business" was an integral part of the government's case, an essential element of the crime, and the Court stressed the term in its charge.

However, despite defense counsel's request to excuse the jury panel, the Court, in denying this Motion, never inquired of the remaining members of the panel as to whether

this remark prejudiced them in any way. The appellant respectfully submits that this refusal to excuse the panel and the lack of inquiry into the prejudicial effects of the venireman's statement, as well as the lack of any cautionary instruction, denied the defendant his right to a trial by an impartial jury in violation of the Sixth Amendment to the Constitution of the United States.

"In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ... ." Constitution of the United States, Amend. VI. The right to a jury trial has been deemed by the Supreme Court of the United States as "the most priceless" safeguard "of individual liberty and of the dignity and worth of every man." Irvin v. Dowd, 366 U. S. 717, 721, 81 S. Ct. 1639, 6 L. Ed. 2d. 751, 755 (1961)

In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. Re Oliver, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499.

The theory of the law is that a juror who has formed an opinion cannot be impartial. Reynolds v. United States, 98 U. S. 145, 155, 25 L. Ed. 244.

The remark by the prospective juror, who allegedly knew Mr. Chiarizio, and whose statement would therefore carry weight with the remaining members of the jury panel,

had the effect of introducing evidence to the jury before the beginning of the trial. "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury... 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' " Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582 (dissenting opinion); Turner v. Louisiana, 379 U. S. 466, 13 L. Ed. 2d 424, 429; 85 S. Ct. 546 (1965).

The judge in the case at bar made no attempt to determine how the jurors were affected by the remark. The Trial Court in impaneling a jury has a serious duty to determine the question of actual bias and a broad discretion in its rulings on challenges therefore. Dennis v. United States, 339 U. S. 162, 168, 70 S. Ct. 519, 521, 94 L. Ed. 734 (1950); Mikus v. United States, 433 F. 2d. 719, 724 (2d. Cir. 1970).

While the appellant recognizes the wide discretion of a trial judge in the voir dire procedure, in exercising its discretion, the trial judge must be zealous to protect the rights of an accused. Dennis v. United States, supra, at 168.

Challenges on the question of jury bias for many reasons have been presented in various Second Circuit cases. Despite the denial of several of these challenges,

one notes the presence of distinguishable elements in those cases, namely that in each, at least some attempt was made by the trial judge to determine the existence of possible prejudice: a colloquy with the judge, United States v. Ploof, 464 F. 2d. 116 (2d. Cir. 1972); an examination by the trial court to determine prejudice. Mikus v. United States, supra; an opportunity granted by the Court to defense counsel to pose additional questions at the time of voir dire. Mikus v. United States, supra; or a final general inquiry concerning prejudice addressed to the jury panel immediately prior to the administering of the oath. United States v. Colabella, 448 F. 2d. 1299 (2d. Cir. 1971).

In the case at bar the remark by the prospective juror went to the core of the issue in the case, whether or not Michael Chiarizio was engaged in a gambling business. The Court's conduct in denying the defendant's timely motion and in continuing the voir dire as it did, was in total disregard of the accepted procedures normally utilized to safeguard the defendant's right to an impartial jury.

It is therefore respectfully submitted that the Court erred in denying the defendant's motion to excuse the entire jury panel.

IV

THE COURT ERRED IN ADMITTING INTO EVIDENCE GOVERNMENT'S EXHIBIT 47, THE VOICE EXEMPLAR OF THE APPELLANT MICHAEL CHIARIZIO, AND GOVERNMENT'S EXHIBITS 54, 55, 57, 58, 60, 61, AND 63 (f) AND (g), THE ORIGINAL TAPES, PEN REGISTER RESULTS AND SUMMARY TAPES, FOR THE REASON THAT THE REQUIRED CHAIN OF CUSTODY AND FOUNDATION HAD NOT BEEN ESTABLISHED.

Agent McWhorter testified that he and Agent Puckett took exemplars of various individuals on February 26, 1974 in Hartford and on April 3rd and 4th, 1974, in New Haven. (Tr. pp. 324-337). He took a voice exemplar of Michael Chiarizio on April 3, 1974 in New Haven. (Tr. p. 335). He testified that he took the Hartford tapes to New Haven with Agent Puckett, but did not himself place these tapes in the "Bulky Exhibit Room" in the New Haven F. B. I. office. (App. pp. 30A-36A). He further testified that he gave the exemplar tapes to Agent Puckett and that the New Haven tapes were similarly given to Agent Puckett. (App. pp. 31A, 32A, 34A). Agent Puckett did not testify at the trial.

Agent McWhorter had no personal knowledge as to the handling of the exemplars after they left his hands other than his knowledge of the usual procedure utilized by the F.B.I. (App. p. 34A). His next contact with the exemplars subsequent to April of 1974 was when he took "some" of these tapes from the Bulky Exhibit Room for the purpose of bringing them to the trial, on or about April 17, 1975. (App. pp. 34A-35A-36A).

From the record it does not appear that Agent McWhorter

even listened to the alleged exemplar of Michael Chiarizio subsequent to the taking of the exemplar in April of 1974. Therefore there is no means by which he could personally verify that no alterations had been made on the tape. The appellant respectfully submits therefore that there is a fatal gap in the chain of custody of these exemplars in that no direct evidence was offered as to their safekeeping during the period in excess of one year while they were allegedly being held in New Haven. Nor did testimony from any other witness supply the missing information. Since their integrity was not established, the Court erred in admitting Exhibit 47 into evidence. (Tr. pp. 325, 335, 337, 342, 343).

The appellant further contends that the Court erred in admitting the original and summary tapes of the alleged telephone intercepts as well as the pen register results, those being Government's Exhibits 54, 55, 57, 58, 60, 61 and 63 (f) and (g). (Tr. pp. 383, 384, 402-408, 531, 532, 545, 546). The evidence at trial showed that the original tapes, which are in evidence, are still sealed, and that the F. B. I., or its employees allegedly made duplicate tapes from these originals, and that summaries of the duplicate tapes were placed in evidence and played to the jury. The appellant acknowledges that the alleged original tapes were sealed at the end of the monitoring periods in April and May of 1973 pursuant to the statutory requirement of 18 U. S. C. 2518(8)(a).

Agent Santacroce's testimony, however, established that throughout the monitoring period, prior to the sealing at the end of the entire period, the alleged original tapes were kept in open or unsealed manila envelopes, in open boxes in a vault in the Federal Building. Approximately 15 or 16 people, including other special agents of the F.B.I., had access to that room. (App. pp. 38A-49A; 52A-62A). Agent Santacroce further testified that he did not always listen to the original tapes each day before putting them in the vault. (App. p. 59A-60A).

In some instances he would listen to the original tapes at some time later when he dubbed them sometimes, but "not always" the next day. (App. p. 60A). These original tapes remained unsealed in the vault throughout their respective monitoring periods. The appellant contends that the Court erred in admitting the original tapes into evidence since the integrity of these tapes was not established.

Since the summary tapes were allegedly made from duplicates of the originals, the taint of the insufficient chain of custody also made the summary tapes inadmissible.

A proper chain of custody must be established before a physical object which is connected with a crime can be admitted into evidence. It must be shown that the object is in substantially the same condition as when the crime was committed; before admitting the object, the trial judge must be satisfied that in "reasonable probability" the object has not been changed in important

respects. To reach this conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. United States v. Penick, 136 F. 2d. 413, 415 (2d. Cir. 1943)

The prevention of tampering with or misidentification of evidence is vital to the admissibility of that evidence at trial. United States v. Jackson, 482 F. 2d. 1264 (8th Cir. 1973).

The appellant respectfully submits that due to the nature of these Exhibits, they being potentially alterable tape recordings, and further due to the glaring gaps in their chain of custody, the Trial Judge could not have been satisfied that in "reasonable probability" these articles had not been changed in important respects. In fact, no evidence was presented to the Trial Judge from which he could draw this conclusion.

Before a sound recording can be admitted into evidence, a proper foundation must be established by showing, among other facts, that the recording is correct and authentic, and that additions, deletions or changes have not been made in the recording. It must also be proven that the recording has been preserved in a manner which is shown to the Court. United States v. McKeever, 169 F. Supp. 426 (Dist. Ct. S. D. N. Y. 1958), reversed on other grounds, 271 F. 2d. 669 (2d. Cir. 1959). "Safeguards against fraud

or other abuse are provided by judicial insistence that a proper foundation for such proof be laid." United States v. McKeever, supra, p. 431. It is respectfully submitted that the government failed to establish the proper foundation necessary for the proper admission of the exemplars, pen register results, original tapes or summary tapes into evidence.

Sound recordings are easily susceptible to alterations. Agent Santacroce testified that even the machines which duplicated the "original" telephone intercepts had the ability to erase either accidentally or intentionally. (App. p. 55A).

> "Through skillful editorial manipulation, alterations may be undetectable, or if detectable at all, then only by the most sophisticated devices and techniques involving time consuming and expensive analysis by technical experts." People v. Nicoletti, 34 N.Y. 2d. 249, 356 N.Y. Supp. 2d. 855, 313 N.E. 2d. 336, 338 (Ct. Appeals N.Y. 1974).

There was no testimony in the case at bar concerning the exact whereabouts of the original voice exemplars from February, 1974 and April, 1974 to the time that Agent McWhorter took "some" of them from the Bulky Exhibit Room in April, 1975. There is no evidence as to whose hands these Exhibits may have passed through during the intervening year. As for the "original intercepted wiretap tapes, there is also no indication as to how many people had access to them, or an opportunity to alter them while they were lying in unsealed envelopes in the open boxes

in the vault. The danger of manipulation is further evidenced by Agent Santacroce's testimony that he did not always listen to the "originals" each night prior to putting them in the vault.

The Second Circuit in United States v. Knohl, 379 F. 2d. 427 (2d. Cir. 1967), Cert. den. 389 U. S. 973, 88 S. Ct. 472 19 L. Ed. 2d. 465 (1967) has recognized the potentialities of alteration of tape recordings:

> "We are not unmindful...that tape recordings are susceptible to alteration and that they often have a persuasive, sometimes a dramatic, impact on a jury. It is therefore incumbent on the government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings..." United States v. Knohl, supra, page 440 (Emphasis Supplied)

There is no question that Congress, in enacting 18 U. S. C. 2518 (8)(a) was especially concerned with the potential for abuse of tape recordings, as evidenced by the sealing requirements.

Although the sealing requirement is not in itself an issue in this case, the appellant respectfully submits that the same considerations which were relevant to the Congressional Congress concern for sealing apply to the preservation of tapes prior to sealing.

> "Paragraph (8) sets out safeguards designed to insure that accurate recordings will be kept of intercepted communications... .

> Appropriate procedures should be developed to safeguard the identity, physical integrity, and contents of the recordings to assure their admissibility into evidence." S. Rep. No. 1097, 90th Cong, 2d. Sess. (1968) reprinted in 1968 U. S. Code Cong. & Admin. News 2112, 2193.

The purpose of the sealing requirement is to protect the confidentiality of the tapes, to prevent alterations, tampering or editing, and to aid in establishing the chain of custody. People v. Nicoletti, supra.

The same reasons which compelled Congress to institute a sealing requirement after completion of the interception period are surely no less applicable to the handling of these tapes prior to sealing. If Congress had intended that law enforcement officers could store tapes in a careless manner prior to sealing there would obviously be no point in later sealing the tapes. To leave such evidence in unsealed envelopes in open boxes, in a vault to which approximately fifteen or sixteen people had access is to invite tampering and abuse, all in derogation of private citizens' rights.

> "The principle of protecting a citizen from the possibilities of altering or tampering with his intercepted conversation recorded by secret devices is so precious that it should not be diluted by any inclination to excuse the Government from its own serious derelection." United States v. Falcone, 505 F. 2d. 478, 488 (3d. Cir. 1974)

(Dissenting opinion), Cert. den.
95 S. Ct. 1338, 43 L. Ed. 2d. 432
(1975).

The taint of the "original" tapes carried forth to the duplicate tapes, and to the summary tapes which were prepared from the duplicate tapes and played for the jury. The same is also true of the voice exemplars. The evidence is clear that a copy of the voice exemplar of the appellant Michael Chiarizio was made for Agent Santacroce's use and sent to Agent Santacroce by means unknown to Agent McWhorter. Agent McWhorter had never listened to the duplicate exemplars. (App. pp. 37A-38A). It is respectfully submitted that the taint of the original exemplars carried forward to the so-called duplicates and subsequently tainted Agent Santacroce's opinion as to the voice of Michael Chiarizio. It should be further noted that neither the judge, the jury, nor defense counsel has ever heard the "original" wiretap tapes since they are still sealed; therefore, none of these people know if the duplicates were accurate, and the alleged summary tapes are another step removed since they were purportedly made from the duplicates.

Since these exhibits comprise the government's major proof of the defendant's guilt the error in admitting the items into evidence was highly prejudicial and constituted reversible error.

V

THE COURT ERRED IN PERMITTING THE JURY TO EXAMINE EXHIBITS MARKED FOR IDENTIFICATION ONLY; WHICH SAID EXHIBITS PURPORTED TO BE TRANSCRIPTS OF CONVERSATIONS MADE FROM DUPLICATE TAPES.

During the playing of all of the tapes of the defendant's alleged telephone conversations, the judge allowed the jury to examine manuscripts which purported to be transcripts of those tapes. Throughout the whole trial these documents remained marked for identification only. Hence, the jury was allowed to view highly prejudicial documents, which were never introduced into evidence.

Despite the fact that defense counsel drew the Court's attention to the case of United States v. Bryant, 480 F. 2d. 785 (2d Cir. 1973) as to the correct procedure for introducing tapes and transcripts into evidence, the Court refused to follow the instructions contained in that case. (App. pp. 24A-30A; 62A-65A). The rationale contained in United States v. Bryant, supra, has been affirmed by this Court, in United States v. Marrapese, 486 F. 2d. 918, 921 (2d. Cir. 1973) wherein the Court stated that the Bryant opinion contained "a thorough discussion of the law in this Circuit relating to the admissibility of tapes and transcripts". United States v. Marrapese, supra, 921.

In United States v. Bryant, supra as in the case at bar, the Judge heard the tape for the first time when it was played to the jury. The Court did not listen to

the tape in order to determine its audibility or ascertain the accuracy of the transcript prior to its submission to the jury.

> "The correct procedure would have been for the Judge to have had the tape played out of the presence of the jury so that he could have ruled on any objections before the jury heard the recording. ... Such procedure would have enabled the judge to rule on all objections, including the competence of the tape before it was played to the jury. And the transcript should have been compared with the tape before the transcript was given to the jury. ... The indicated procedure " intended to avoid a mistrial or reversal due to an inaudible and Prejudicial tape being played to the jury or an inaccurate transcript being submitted to them." United States v. Bryant, supra, at p. 789.

The appellant respectfully submits that the very circumstances which the approved procedure in the Bryant case, was designed to protect against, occurred in the case at bar. Inaudible, prejudicial tapes were played to the jury and inaccurate "transcripts" were given to each juror to supplement the tapes. Also, it should be noted that defense counsel made no stipulation as to the accuracy of the transcripts and expressed to the judge his disagreement with the majority of the transcripts. Defense counsel specifically stated that he agreed that perhaps twenty percent or at the most twenty five percent of the transcripts proposed to be used by the government were accurate. (App. p. 64A). Later in the trial the

questionable accuracy of these transcripts was further demonstrated when Agent Santacroce admitted that he sometimes disagreed with the various interpretations of the girl who had prepared the transcripts in the F.B.I. office by listening to the tapes. Agent Santacroce admitted that in such instances his opinion prevailed merely because he was "the boss". (App. p. 78A-86A). Thus, even the preparers of these transcripts could not fully agreed on a correct or accurate interpretation. Portions of the tapes themselves were highly inaudible. Agent Santacroce admitted that in many cases the language in the tapes was unclear. (App. p. 72A-78A). Even the Judge stated that some tapes were inaudible or garbled. (Tr. p. 511). In such a situation, it is only natural that the Jury would rely heavily upon the transcripts, documents of highly questionable accuracy. It is submitted that under the holding of the Bryant case, supra, it would have been improper to admit the transcript into evidence and as a result, it was most certainly improper to attempt to reach the same result by marking the transcripts for identification only and then submitting them to the jury. That procedure carried to a logical extreme would result in counsel marking clearly inadmissible documents for identification and then displaying them to the jury, thereby making a mockery of well established rules for admitting documents into evidence.

It should be noted that in the instant case there

was no stipulation as to the transcripts' or the tapes' accuracy thereby making the rationale of such cases as United States v. Koska, 443 F. 2d. 1167 (2d. Cir. 1971), Cert. den. 404 U. S. 852, 92 S. Ct. 92, 30 L. Ed. 2d. 92 (1971) and United States v. Carson, 464 F. 2d. 424 (2d. Cir. 1972), Cert. den. 409 U. S. 949 93 S. Ct. 268, 34 L. Ed. 2d. 219 (1972) inapplicable.

In United States v. McKeever, 271 F. 2d. 669 2d. Cir. (1959), although reversing the trial court on other grounds, this Court praised the conduct of the trial court's actions in United States v. McKeever, 169 F. Supp. 426 (S. D. N. Y. 1958), wherein the trial court had ruled that before tapes could be played to the jury, a preliminary hearing without the jury should be held. Moreover, the trial court had attempted to get agreement among counsel as to the contents of the tapes.

A number of other Circuits seems to have similarly acknowledged that the proper procedure before admitting tape recordings is for the trial court to hear the tape first, in the absence of the jury, in order to rule on admissibility. Gorin v. United States, 313 F. 2d. 641 (1st. Cir. 1963); Cert. den. 374 U. S. 829, 83 S. Ct. 1870, 10 L. Ed. 2d. 1052 (1963); Brandow v. United States, 268 F. 2d. 559 (9th Cir. 1959); Cape v. United States, 283 F. 2d. 430 (9th Cir. 1960); Monroe v. United States, 98 App. D. C. 228, 234 F. 2d. 49 (1956), Cert. den. 352 U. S. 873, 77 S. Ct. 94, 1 L. Ed. 2d. 76 (1956), reh. den. 352 U. S. 937, 77 S. Ct. 219, 1 L. Ed. 2d. 170 (1956), 355 U. S. 875,

78 S. Ct. 114, 2 L. Ed. 2d. 79 (1957); Todisco v. United States, 298 F. 2d. 208 (9th Cir. 1961), Cert den. 368 U. S. 989, 82 S. Ct. 602, 7 L. Ed. 2d. 527 (1962); In cases involving transcripts, similar conditions and procedures apply. United States v. Hall, 342 F. 2d. 849 (4th Cir. 1959) Cert. den. 382 U. S. 812, 86 S. Ct. 28, 15 L. Ed. 2d. 60 (1965); Fountain v. United States, 384 F. 2d. 624 (5th Cir. 1967), Cert. den. sub nom. Marshall v. United States, 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d. 105 (1968).

In the case at bar, after disregarding the requirement of United States v. Bryant, supra, the Trial Judge proceeded to allow the government to play to the jury a myriad of summary tapes of alleged telephone conversations purportedly between the appellant and other persons. While these tapes were being played, the Judge permitted the jury to read government prepared documents alleged to be transcripts of those tapes. Those transcripts were never admitted into evidence, and were marked for identification only. These documents were obviously highly prejudicial to the defendant, in that, without being raised to the dignity of formal exhibits, they had the effect of supplying the jury with additional evidence of the defendant's alleged guilt.

Again these exhibits were marked for identification only.

> "Where documents have not been formally introduced into evidence, they may not be exhibited to the jury". 88

C. J. S. Trial Section 61 (b)

In a case similar to the case at bar, Brady v. State, 178 So. 2d. 121, (Dist. Ct. of App. of Fla, Second District 1965), the Court reversed a defendant's conviction for violating the state lottery laws, and held that it was harmful error to allow the jury to use copies of a transcript, excluded from evidence, as an aid in listening to a partially inaudible tape recording. The Trial Court had permitted copies of the transcript to be given to the Court and the Jury while the tape was played. Although, the Trial Court emphatically warned the jurors that they were not to consider the transcript as evidence, and that they were to consider only what they heard, and that the transcripts were merely for assistance in following the recording, the Appellate Court nevertheless reversed, stating,

> "It is not possible to say what effect was wrought through the process of synchronizing the typewritten words of the disallowed transcript with what may have been audible from the recording as it was being played. As the jurors read and listened and simultaneously assayed, under the court's admonition, to sort out the audible from the inaudible and eradicate from consideration that which they could not hear or understand, the typed matter which remained before them throughout the audition, could have etched on their minds words or impressions not derived from the sounds which emanated from the recording. ...Because of the inherent potency of the written words, we cannot say that there resulted the effectiveness intended by the court in its oral instructions that the jurors not consider portions which they read but could not hear or grasp through listening to the recording". Brady v. State, supra, p. 125.

Cases which have approved of allowing the jury to have transcripts, are easily distinguishable, in that in all of them, there had been a personal inspection by the Court of the tapes and transcripts to determine their accuracy, prior to their being submitted to the Jury. C. F. United States v. Lawson, 347 F. Supp. 144 (E. D. Penn. 1972); Fountain v. United States, supra. In the case at bar, due to the inaudibility of portions of the tape, as acknowledged by even the Court, and Agent Santacroce, the jury could not help but rely on these exhibits for independent evidentiary value. The result was that the jury, in arriving at its decision, essentially must have considered documents which were not in evidence.

The appellant respectfully submits that the Court erred in permitting the "transcripts" marked as exhibits for identification only to be shown to the jury.

VI

THE COURT ERRED IN ALLOWING AGENT SANTACROCE TO READ TO THE JURY FROM THE ALLEGED TRANSCRIPTS, THOSE TRANSCRIPTS BEING DOCUMENTS NOT IN EVIDENCE.

During his testimony to the Court and Jury, despite objections from defense counsel, Agent Santacroce was permitted to read to the Jury from the purported transcripts of the defendant's alleged telephone conversations, which had been received and marked for identification only.

It is the appellant's contention that this conduct constituted reversible error on two grounds, the first being that Agent Santacroce was allowed to give testimony

from documents which were not evidence, and the second being that the procedure violated the best evidence rule. With respect to the argument that Agent Santacroce was allowed to read from documents marked for identification only, the appellant respectfully requests the Court to consider the authorities and arguments presented in Issue V as incorporated in the present issue.

Further, it is submitted, that "a witness should not be permitted to read a paper to the jury unless the paper itself has been admitted." 88 C. J. S. Trial, Section 61 (b). Allowing Agent Santacroce to read these unstipulated, documents of questionable accuracy, tended to dignify these exhibits to the level of evidence. It is respectfully submitted that the jury should not have been allowed to hear this highly prejudicial testimony. In Lindsey v. United States, 332 F. 2d. 688 (9th Cir. 1964) the United States Attorney read to the jury from a transcript of a tape conversation, which transcript had been marked for identification only but was not in evidence. The Court stated

> "Appellant's fourth point is that the United States erred in reading to the jury from a document not received in evidence. Baldly so stated, one conceives that error must have existed". Lindsey v. United States, supra, at p. 691 (Emphasis supplied).

The Court in Lindsey v. United States, supra, ruled that in the context of the total circumstances surrounding the trial the action of the prosecutor did not constitute

reversible error. However, the very factors that the Lindsey, Court emphasized in its rationale are present in exactly the opposite context in the case at bar. In Lindsey v. United States, supra,there was no contention that portions of the tapes were inaudible, thereby no doubt was cast on the transcripts' authenticity or accuracy. The Court further found that the tape was "remarkably clear and easy to hear" and that every word which was read to the jury was plainly heard in the recording" Lindsey v. United States, supra, p. 692.

It is respectfully submitted that the above factors which "saved" the Lindsey case from error are not present in the instant appeal.

On the contrary, the tapes in this case are garbled and inaudible in places and every word read to the jury by Agent Santacroce is not in the tapes. The vice of permitting this conduct is to permit interpretation by intonation. (App. pp. 82A-86A).

The reading of these documents to the jury also constituted reversible error because the action of the Court in allowing it violated the best evidence rule.

> "The rule is this: in proving the terms of a writing where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious faults of the proponent... . Sound recordings where their content is sought to be proved, so

> clearly involve the identical considerations applicable to writings, as to warrant inclusion within the present rule". McCormick, Evidence, Section 230, Section 232 (Cleary Ed. 1972).

It is submitted that the tapes themselves constituted the best evidence and therefore the "transcripts" should not have been read to the jury.

It is respectfully submitted that the Court erred in allowing Agent Santacroce to read the "transcripts" to the jury and that the gravity of the detriment caused to the appellant by this action constitutes reversible error.

VII

THE COURT ERRED IN ALLOWING THE JURY TO RECEIVE AND EXAMINE CERTAIN CARDS, WHICH WERE ATTACHED TO THE TRANSCRIPTS, BUT WHICH WERE NOT MARKED FOR IDENTIFICATION, OR RECEIVED IN EVIDENCE AS FULL EXHIBITS.

Attached to each purported transcript of the tape recordings was a white card which contained, along with the date, time, digital counter setting, United States District Court Number and telephone number, the names of the alleged parties to various conversations. (App. pp. 92A-96A). These white cards were not introduced into evidence and yet the jury was allowed to see them.

In its request to the Court to allow the jury to view the purported transcripts, the Government made no mention of the attached white cards. Afte some "transcripts" had already been distributed to the jury over objection,

defense counsel discovered these cards and directed the Court's attention to this fact. (App. pp. 65A-72A). Over various defendants' objections, the cards were allowed to remain attached to the alleged transcripts and were given to the jury.

These cards were not transcripts of conversations and as a result appellant questions whether these cards can even be considered as marked for identification, as were the "transcripts" to which they were attached. Nevertheless, the cards were definitely never received into evidence as full exhibits.

These cards had strong evidentiary value and an effect on the jury in that they purported to identify the parties to the conversations as certain of the defendants, including the appellant Michael Chiarizio. Since one of the ultimate questions of fact for the jury was the identity of the parties to the alleged conversations, the error in allowing the jury to view these cards was extremely harmful.

"Where documents have not been formally introduced into evidence, they may not be exhibited to the jury". 88 C. J. S. Trial Section 61 (b). Here, the appellant respectfully requests the Court to incorporate by reference, the arguments previously set forth concerning other items which were shown to the jury which had not been received in evidence, and had been marked for identification only. See Issues V and VI.

The showing of these cards to the jury further constituted error in that it violated the hearsay rule.

> "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter". McCormick, Evidence Section 246 (Cleary Ed. 1972)

The record in the case at bar is not clear as to who actually prepared these cards. Agent Santacroce stated that it was his opinion as to the names of the persons whose voices were overheard. (App. p. 91A). However, unlike the purported transcripts, nowhere in the trial transcript does he state that he prepared the cards himself, or caused someone else to prepare them. Thus these cards constituted out-of-court statements which were being used to prove the truth of the matters therein, namely, that the conversations in the alleged transcripts took place at a certain time and date on a certain phone number, and between certain parties.

Since these cards were not properly authenticated, and since one of the ultimate questions of fact for the jury was the identity of the parties to the alleged conversations, it is respectfully submitted that their admission constituted harmful, reversible error.

VIII

THE COURT ERRED IN ADMITTING THE OPINION TESTIMONY OF AGENT SANTACROCE CONCERNING THE IDENTITY OF VOICES HEARD ON THE TAPES AND FURTHER ERRED IN ADMITTING HIS OPINION THAT SAID CONVERSATIONS WERE OF A GAMBLING NATURE.

Despite defense counsel's timely objections, Agent

Santacroce was permitted to give his opinion as to the identity of the voices contained on the tapes. (App. pp. 49A-52A). He also was allowed to give his opinion that the conversations he heard were of a gambling nature. It is respectfully submitted that the admission of Agent Santacroce's testimony pertaining to these matters was harmful, reversible error.

> "It is a fundamental rule of... evidence...that...testimony of witnesses...must be confined to statements of concrete facts within their own observation, knowledge and recollection...distinguished from their opinions, inferences impressions,and conclusions drawn from such facts... .[T]he opinion or conclusion of a witness upon a fact or facts in issue is incompetent and inadmissible... . A witness...cannot, over objection, be asked questions calling for, or be permitted to express, his opinion or conclusion upon facts which are in the province of, and are to be determined by, the jury..." 31 Am. Jur. 2d. Expert And Opinion Evidence, Section 2 p. 494-496.

In the case at bar, the government did not attempt to qualify Agent Santacroce as an expert on gambling terms or on gambling conversations. This fact clearly distinguishes the instant case from the factual situation presented in such Second Circuit cases as United States v. Cirillo, 499 F. 2d. 872 (2d. Cir. 1974); and United States v. Borrone-Iglar, 468 F. 2d. 419 (2d. Cir. 1972).

In those cases, it is clear from the opinion of the Court, that the witnesses testifying as to meaning of various narcotic terms, were qualified by the government as experts before the admissibility of their testimony became an issue.

It is respectfully submitted that without the qualification of Agent Santacroce as an expert, his opinion was inadmissible and that the Court's ruling in that regard constituted reversible error.

The Court also erred in allowing Agent Santacroce to give his opinion as to the identity of voices intercepted on the wire taps. By his own admission, Agent Santacroce was not an expert on speech patterns (App. p. 86A-89A). The government again, did not attempt to qualify him as a voice expert, and further never established before the jury any claim that he was personally familiar with the voice of the Appellant, Michael Chiarizio. The evidence offered by the government merely indicated that Agent Santacroce was present at the taking of the voice exemplars from Cecil Johnson and Philip Frascarelli. With respect to the claimed identification of the voice of Michael Chiarizio, the evidence offered at trial established that Agent Santacroce's only contact with Chiarizio's voice was from listening to the alleged duplicate of a voice exemplar purporting to have been taken from Michael Chiarizio.

Obviously, an ultimate question of fact for the jury

to determine in this case, was whether one of the voices on the tapes in issue was that of Michael Chiarizio. It does not appear that the jury ever listened to the alleged voice exemplar of Michael Chiarizio, nor does it appear that the appellant ever spoke in Court. Consequently, the jury had only Agent Santacroce's opinion that the voice which was heard on various tapes was that of the appellant, Michael Chiarizio.

Agent Santacroce further admitted that he had a preconceived notion as to which people he was going to hear on the tapes. (App. pp. 89A-91A). The only basis established before the jury for his opinion, was his comparison of the alleged voice exemplar with the voices contained on the tapes.

The standard for the admissibility of an opinion as to the identity of a speaker is merely that the witness has heard the voice of the alleged speaker at any time. United States v. Rizzo, 492 F. 2d. 443 (2d. Cir. 1974), cert. den. 94 S. Ct. 3069 (1974). An examination of decisions wherein witnesses have been allowed to give opinion testimony concerning the identity of voices reveals that in each case, the witness had some personal familiarity with the voice through personal contact. Opinion evidence has been admitted where the witness was a party to the conversation, United States v. Kaufer, 387 F. 2d. 17 (2d. Cir. 1967); Todisco v. United States, 298 F. 2d. 208 (9th Cir. 1961), Cert. den. 368 U. S. 989, 82 S. Ct. 602, 7

L. Ed. 2d. 527 (1962); or had known the defendants for many years, Fountain v. United States, 384 F. 2d. 624 (5th Cir. 1967); Cert. den. sub nom. Marshall v. United States, 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d. 105 (1968); or where there had been face to face conversations, United States v. Whitaker, 372 F. Supp. 154 (Dist. Ct. M.D. Penn. 1974); or had had at least minimal exposure by reason of face to face contact, United States v. Bonanno, 487 F. 2d. 654, 656; (2d. Cir. 1973); United States v. Moia, 251 F. 2d. 255, 257, (2d. Cir. 1958); or subsequent acquaintanceship, United States v. Borrone-Iglar, supra.

It is respectfully submitted that none of the factors enumerated above are present in the case at bar.

The government offered no evidence to the jury of any prior or subsequent contact with the voice of the appellant Michael Chiarizio other than that contained in the tainted voice exemplar which, was never played for the jury.

As argued in other portions of this Brief, the integrity of the voice exemplars itself is highly doubtful. Even if the integrity of these exhibits were established, the appellant respectfully submits that the prior or subsequent acquaintanceship with a defendant's voice, sufficient to allow identification in Court, requires a personal contact with the speaker, and not merely a contact by reason of mechanical voice exemplars. In the case at

bar the trial testimony does not reflect that Agent Santacroce had even the "weak" "subsequent acquaintanceship" with the appellant Michael Chiarizio's voice as was present in United States v. Borrone-Iglar, supra.

It is respectfully submitted, as noted by defense counsel's timely objection, that the jury, was equally capable of making the voice comparison between the tapes and the alleged voice exemplar, and that the Court, in allowing Agent Santacroce to express his opinion in that regard usurped the jury's function in determining this ultimate fact.

It is respectfully submitted that this error was harmful and prejudicial, and constitutes reversible error.

CONCLUSION

For all of the reasons hereinbefore set forth, the defendant respectfully submits that this Court should set aside the conviction of the defendant as to both Counts, and dismiss the charges against him.

Respectfully submitted,

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Of CounseL

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ADDENDUM CONTAINING STATUTES PERTINENT TO THIS APPEAL

STATUTES INVOLVED

The statutes involved in this dispute are as follows:

U.S.C. Title 18, Section 1955(a),(b),(c) wherein the pertinent parts provide as follows:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) 'illegal gambling business'means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling'includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established."

Connecticut General Statutes, Title 53, Section 295 wherein the pertinent parts provide as follows:

"Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or

carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest."

U. S. C. Title 18, Section 371 wherein the pertinent parts provide as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both

If, however, the offense, the commission of which is the oject of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

U. S. C. Title 18, Section 2518(1)(e) wherein the pertinent parts provide as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:...

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the

application, and the action taken by the judge on each such application;

U. S. C. Title 18, Section 2518(5) wherein the pertinent parts provide as follows:

"(5) No order entered under this section may authorize or approve the interception of any wire or oral communcation for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

U. S. C. Title 18, Section 2515 wherein the pertinent parts provide as follows:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in

evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

U. S. C. Title 18, Section 2518(1)(b)(iv) wherein the pertinent parts provide as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:...

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including...

(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

U. S. C. Title 18, Section 2518(4)(a) wherein the pertinent parts provide as follows:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify-

(a) the identity of the person, if known, whose communications are to be intercepted;

U. S. C. Title 18, Section 2518(10)(a)(i) wherein the pertinent parts provide as follows:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may, move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom on the grounds that-

(i) the communcation was unlawfully intercepted;"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	:	
VS.	:	DOCKET NO. 75-1224
MICHAEL CHIARIZIO	:	

CERTIFICATION

This is to certify that on the 28th day of August, 1975, I served two copies of the Appellant's Brief and one copy of the Appendix of the Appellant, by depositing the same in the United States mail, postage prepaid, addressed as follows: Paul E. Coffey, Esq., Special Attorney, United States District Court, 450 Main Street, Hartford, Connecticut.

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